Lee No 59

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 503

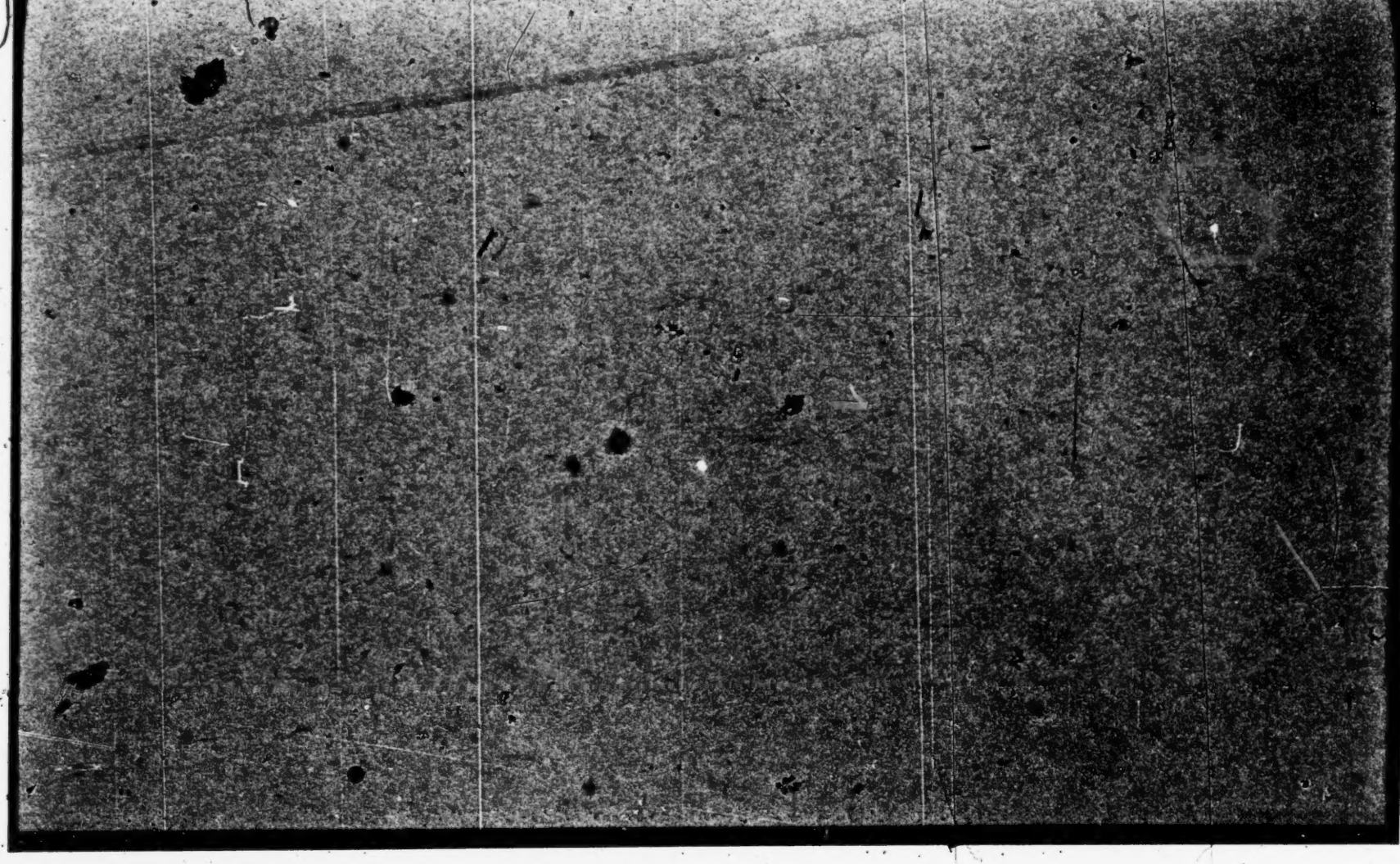
LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT

vs.

ALBERT BAILEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

ALBERT BAREFIELD

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX

	Original	Print
Record from circuit court of Pope County	1	1
Caption (omitted in printing)	1	
Complaint	2	1
Recital as to summons (omitted in printing)	4	
Minute entries (omitted in printing)	5	
Answer	6	2
Judgment	8	4
Motion for new trial	9	4
Order overruling motion for new trial	12	6
Bill of exceptions	13	6
Caption (omitted in printing)	13	
Stipulation of facts	13	6
Exhibit 1—Insurance policy (omitted in printing)	15	
Agreement as to bill of exceptions (omitted in printing)	25	
Clerk's certificate (omitted in printing)	27	
Bill of costs (omitted in printing)	28	
Proceedings in supreme court of Arkansas	29	7
Caption (omitted in printing)	29	
Judgment	30	8
Opinion, Smith, J.	31	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1933

	Original	Print
Assignments of error	35	12
Petition for appeal, assignments of error, and prayer for reversal (omitted in printing)	37	
Order denying appeal (omitted in printing)	41	
Supplemental petition for appeal, assignments of error, and prayer for reversal	42	13
Petition for appeal, assignments of error, and prayer for reversal	49	19
Order allowing appeal	53	23
Citation and service (omitted in printing)	54	
Bond on appeal (" " ")	55	
Certificate of lodgment (" " ")	61	
Clerk's certificate (" " ")	62	
Statement of points to be relied upon and designation of parts of record to be printed	63	24

[fols. a–2]

IN CIRCUIT COURT OF POPE COUNTY, ARKANSAS

ALBERT BAREFIELD, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, INC., Defendant

COMPLAINT AT LAW—Filed Sept. 21, 1932

Comes the plaintiff, Albert Berefield, and for his cause of action herein against the defendant, the Life & Casualty Insurance Company of Tennessee, Inc., alleges and states:

That the plaintiff, Albert Barefield, is a resident of Russellville, Arkansas, and the defendant, the Life & Casualty Insurance Company of Tennessee, Inc., is a foreign insurance company, with its head office in Nashville, Tennessee, and has applied for and been permitted to do business in the State of Arkansas.

That on the 14th day of March, 1928, the defendant herein, the Life & Casualty Insurance Company of Tennessee, Inc., issued Policy No. 221659, covering the life, hands, feet and eyes of the plaintiff, Albert Barefield, for an annual premium of Five Dollars ($5.00), which premium was paid in advance.

That the said premium was paid on or before the 15th day of March in each and every year, including 1932.

That by the terms of said policy, in case the insured should lose the sight of one eye by accident to any private horse-drawn vehicle or private motor-driven car, in which insured is riding or driving, that the company herein referred to as defendant shall pay to the insured the sum of One Thousand Two Hundred Fifty ($1,250.00), and that each consecutive renewal without a default in payment of premium will increase the amount of benefits herein provided for death, dismemberment, or loss of sight of the [fols. 3-5] insured at the rate of ten per cent of the original amounts, until fifty per cent of the original amounts are thus added.

That on the 25th day of February, 1932, the plaintiff herein was traveling north on the Dardanelle-Russellville Highway in a Ford Coupe in company with Emmett Barefield, son of the plaintiff herein, when the said plaintiff met a large Sedan traveling in the opposite direction at a high rate of speed, when just as they were even with the Sedan, the said Sedan ran over a stick, flipped the said stick in the direction of the car in which this plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye.

That the accident above referred to is covered by the terms of said policy; that said accident occurred while said policy was in full force and effect.

That the said company has refused and neglicted to pay said sum in spite of repeated demands by this plaintiff.

Wherefore, premises seen, plaintiff prays judgment in the amount of One Thousand Six Hundred Twenty-five Dollars ($1,625.00), plus twelve per cent damages upon the amount of said loss, interest at rate of 6% from date of accident, attorney's fees, costs herein, and all other and further relief which is deemed just and proper.

—— ——, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 6] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

ANSWER—Filed Nov. 15, 1932

Comes now the above named defendant, and for its answer to the complaint of the plaintiff filed herein, alleges and states:

That it denies that by the terms of the policy referred to in plaintiff's complaint, in case the plaintiff should lose the sight of one eye by any accident to any private horse drawn or private motor driven vehicle or car, in which the assured is riding or driving, that the defendant should pay to the plaintiff the sum of $1250.00, or any other amount,

and denies that each consecutive renewal without default in payment of premium increases the amount of alleged benefits provided for the loss of the sight of the plaintiff's eye, and denies that said alleged increase is at the rate of 10% of the original amount until 50%, or any other per cent, of the original amount has been added.

That it denies that on the 25th day of February, 1932, or at any other time, the plaintiff herein was traveling North or in any other direction, on the highway mentioned in plaintiff's complaint, or on any other highway, and denies that plaintiff was proceeding as alleged in his complaint, in a Ford Coupe, and denies that plaintiff met a sedan traveling in the opposite direction or in any direction, and denies that said sedan was traveling at a high rate of speed, and denies that when said alleged sedan got even with the car in which plaintiff is alleged to have been driving, that said sedan ran over a stick, and denies that said stick was flipped in the direction of the car in which the [fol. 7] plaintiff was riding, and denies that said stick struck the car in which plaintiff is alleged to have been riding, and denies that said stick struck said car at the front or left hand door, or in any other place. That it denies that said stick was hurled into the car in which plaintiff was riding, and denies that it struck the plaintiff in the right, or either eye, and denies that the plaintiff was thereby caused to lose the tital sight of said eye, and denies that the plaintiff was thereby caused to lose the irrecoverable sight of said eye:

That it denies that the alleged accident referred to in plaintiff's complaint is covered by the terms of the policy referred to in said complaint.

Wherefore defendant, having fully answered, prays that the plaintiff take nothing by reason of his complaint herein, and that the defendant recover its costs herein laid out and expended, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 8] IN CIRCUIT COURT OF POPE COUNTY

#1017

H. A. BAREFIELD, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENN., INC., Defendant

JUDGMENT—November 15, 1932

Now on this day this cause comes on for hearing, comes the plaintiff by his attorney John G. Rye and comes the defendant by its attorneys Cravens & Cravens and this case is submitted to the court upon the stipulations of the parties herein.

The Court being well and sufficiently advised in this cause renders judgment in favor of the plaintiff for $1625.00 with 12% penalty and $162.50 fixed as attorney's fees.

Defendant at the time excepts to said judgment of the Court.

It is therefore, considered, ordered, and adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant the said sum of $1625.00 with 12% penalty and $162.50 attorney's fees and all cost in this suit laid out and expended.

[fol. 9] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Nov. 15, 1932

Comes now the above named defendant and moves the Court to set aside the findings and judgment of the Court rendered herein on the 15th day of November, 1932, and to grant the defendant a new trial of the issues in this cause and for grounds therefor states:

First. Because the findings and judgment of the Court is contrary to law.

Second. Because the findings and judgment of the Court is contrary to the evidence.

Third. Because the findings and judgment of the Court is contrary to the law and the evidence.

Fourth. Because the findings and judgment of the Court is without sufficient evidence to support them.

Fifth. Because the findings and judgment of the Court is without any evidence to support them.

Sixth. Because the findings and judgment of the Court is contrary to the stipulation of facts filed herein by the parties.

Seventh. Because the findings and judgment of the Court herein are not supported by the stipulated facts filed herein.

Eighth. Because the court erred in allowing a penalty in favor of the plaintiff and against the defendant for the reason that the defendant in resisting plaintiff's claim had reasonable grounds and cause therefor and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of being vexatious or for delay, but upon a well-founded belief that the plaintiff was [fol. 10] not entitled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness of the defendant's refusal to pay, and without regard as to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law, and the fact that the plaintiff was not entitled to recover and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or

vexatious, and without regard as to whether the defendant's refusal to pay was based upon a well-founded belief, reasonably entertained under the facts, that the plaintiff was not entitled to recover, and that said Section of the Statute aforesaid, as so construed, deprives the defendant of due process of law and the equal protection of the law contrary to the provisions of the Constitution of the United States aforesaid, and the Constitution of the State of Arkansas as hereinabove set forth.

Ninth. Because the court erred in allowing plaintiff an attorney's fee for the reasons stated in item 8 hereof.

[fol. 11] Wherefore, premises considered, defendant prays that the findings and judgment of the Court rendered herein as aforesaid be annulled and set aside, and that it be granted a new trial herein, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 12] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—November 15, 1932.

Now on this day defendant files motion for new trial, which motion is by the court overruled, to which overruling by the court the defendant at the time excepts and prays an appeal to the Supreme Court, which is granted and is given 90 days to prepare and file Bill of Exceptions.

[fol. 13] IN CIRCUIT COURT OF POPE COUNTY

[Title omitted]

Bill of Exceptions—Filed Dec. 5, 1932

STIPULATION OF FACTS

"It is agreed that the following are the facts in this case, and that this stipulation is submitted to the Court for de-

termination as to the liability of the defendant Company without any other evidence. It is accordingly agreed:

"1. That the facts are as stated in the complaint at law, filed by the plaintiff, and if the facts so stated make out a case of liability against the defendant in favor of the plaintiff, the Court is authorized to render a judgment against the defendant in favor of the plaintiff for the sum of One Thousand and Six Hundred Twenty Five ($1,625) Dollars, and penalty of 12% if the Court finds plaintiff is entitled to said penalty from the facts stipulated herein, subject to defendant's right to except and appeal to *to* the Supreme Court of Arkansas for a reversal of such judgment. If the judgment should be in favor of the defendant, the plaintiff shall have the right to except and to appeal to the said Supreme Court for a reversal of such judgment.

[fols. 14-29] "2. That policy No. 221659 sued on in this case, issued to Albert Barefield, is hereby filed as Exhibit 1 to this stipulation and made a part thereof to the same extent as if copied in full herein, thereby making each provision of said policy evidence in this case.

"3. Although it is agreed that each and every provision of said policy may be looked to in determining the liability under the policy, the following provisions are set out as applicable to such matters:

'Or if the Insured shall be the collision of or by any accident to any railroad passenger car, passenger steamship, public omnibus, street railway car, taxicab or automobile, stage or bus, which is being driven or operated at the time by a person regularly employed for that purpose, and in which such Insured *is regularly employed for that purpose, and in which such Insured is* traveling as a fare paying passenger or on which he is lawfully riding on a pass; or by the collision of or by any accident to any passenger elevator in which Insured is riding as a passenger; provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident.'

"4. It is agreed that all premiums had been paid on said policy, that all proper notices were given, and that said policy was in force at the time which the plaintiff alleges he was injured.

"As above stated, it is agreed that the above facts are true and are to be used as evidence by both parties.

"This 15th day of November, 1932.

"John G. Rye, Attorney for Plaintiff. Cravens & Cravens, Attorneys for Defendant."

[fol. 30] IN SUPREME COURT OF ARKANSAS

No. 3042

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

ALBERT BAREFIELD, Appellee

Appeal from Pope Circuit Court

JUDGMENT—June 26, 1933

This cause came on to be heard upon the transcript of the record of the circuit court of Pope county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this Court in this cause expended, and have execution thereof.

Opinion by Smith, J.; Kirby, J., dissents.

No petition for rehearing was filed.

[fol. 31] IN SUPREME COURT OF ARKANSAS

No. 57

LIFE AND CASUALTY INSURANCE CO. OF TENNESSEE

v.

BAREFIELD

OPINION—June 26, 1933

SMITH, J.:

This is a suit on an accident policy, and from a judgment in favor of the insured is this appeal.

The complaint alleged that the plaintiff was traveling north in a Ford coupe, in company with his son, when they met a large sedan traveling in the opposite direction at a high rate of speed, and just as the cars were passing the sedan ran over a stick and "flipped the said stick in the direction of the car in which the plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye. That the accident above referred to is covered by the terms of said policy; that said accident occurred while said policy was in full force and effect."

The cause was heard on a stipulation, which recited that "the facts are as stated in the complaint at law, filed by the plaintiff, and if the facts so stated make out a case of liability against the defendant in favor of the plaintiff, the court is authorized to render a judgment against the defendant in favor of the plaintiff for the sum of $1625.00, and penalty of 12% if the court finds plaintiff is entitled to said penalty from the facts stipulated herein, subject to defendant's right to except and appeal to the Supreme Court of Arkansas for a reversal of such judgment."

The stipulation incorporated the relevant portion of the policy sued on, which reads as follows: The appellant insures the plaintiff against the result of certain bodily injuries, including the loss of an eye "* * * if the insured [fol. 32] shall by the collision of or by any accident to any railroad passenger car, passenger steamship, public omnibus, street railway car, taxicab or automobile, stage or bus,

which is being driven or operated at the time by a person regularly employed for that purpose, and in which such insured is traveling as a fare paying passenger or on which he is lawfully riding on a pass; or by the collision of or by any accident to any private horse drawn vehicle or private motor driven car in which insured is riding or driving; or shall by any accident to any passenger elevator in which insured is riding as a passenger; provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident."

For the reversal of the judgment of the court below it is insisted that, under the stipulation as to the facts, there is no evidence that there was any "external or visible evidence on said vehicle of a collision or accident," as required by the policy, and also that no causal connection was shown between the loss of the eye and the accident to the car.

It appears, however, that there was an accident to the car. It was an accident within the meaning of the policy for the flying stick to strike the car, and in striking the car the stick was deflected so as to strike the plaintiff and cause the loss of his eye, and if it be said that there was left no external or visible evidence on the car of the accident, this provision was in the nature of an exception to the event insured against, to-wit, that the insured, while riding in one car, should be accidently injured through the operation of another. Plaintiff having made proof that he was so injured, the burden was upon the insurer to show that the case fell within an exception to the contract by which the [fol. 33] insurer had indemnified the insured against such an injury.

The rule appears to be that, when proof is made of damage apparently within a policy of insurance, the burden is on the insurer to show that the injury or damage was caused by an event from the occurrence of which the insurer had exempted itself from liability. The rule is stated at Section 599 of the chapter on Insurance in 14 R. C. L., page 1437, as follows: "Where proof is made of a loss apparently within a policy, the burden is on the insurer to prove that the loss arose from a cause for which it is not liable. Accordingly while the plaintiff in an action on an accident policy must prove that the death was caused by accidental means, yet where prima facie evidence of that

fact has been adduced, the defendant must show that the death of the insured resulted from an excepted cause."

The following, among other, decisions of this court are to the same effect: Grand Lodge A. O. U. W. v. Banister, 80 Ark. 190, 96 S. W. 742; Continental Casualty Co. v. Todd, 82 Ark. 214, 101 S. W. 268; Aetna Life Ins. Co. v. Taylor, 128 Ark. 155, 193 S. W. 540; Harrison v. Interstate Business Men's Acc. Assn., 133 Ark. 163, 202 S. W. 34; Mutual Life Ins. Co. of New York v. Raymond, 176 Ark. 879, 4 S. W. (2d) 536.

We are of the opinion also that there was such causal connection, under the provisions of the policy, between the accident and the injury as to sustain the judgment of the court. The flipping of the stick was clearly an accident. The stick was thrown against the car, and, after striking the car, was so deflected that it struck the plaintiff and injured him. That the stick did strike the car, and was deflected in so doing, is a fact which the parties have stipu- [fol. 34] lated to be true, and this stipulation, in our opinion, distinguishes the instant case from that of Life & Casualty Ins. Co. of Tennessee v. Whitehurst, 148 So. 162, decided by the Court of Appeals of Alabama, which was cited by appellant and relied upon as announcing the legal principle which should control our decision.

It is finally insisted that the trial court erred in assessing a penalty and attorney's fee in this case, for the reason that the insurer had defended in good faith under the belief that it was not liable. We have held, however, to the contrary. The plaintiff recovered the full amount sued for; indeed, there was a stipulation declaring the extent of the liability if the insurer was liable at all, and the fact that the assertion of non-liability was made in good faith is no valid defense to the assessment of a penalty and the allowance of an attorney's fee, as provided in Section 6155 Crawford & Moses' Digest. There was a review of what we regarded as the controlling authorities upon this subject in the recent case of Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, and we do not again review them.

As we construe the contract sued on, the judgment is correct, and it is, therefore, affirmed.

[fol. 35] IN SUPREME COURT OF ARKANSAS

ASSIGNMENTS OF ERROR MADE IN THE BRIEF OF APPELLANT FILED IN THE ARKANSAS SUPREME COURT

I

There is no evidence to support the judgment of the Court.

II

The Court erred in holding that the agreed state of facts as a matter of law imposed upon the appellant any liability whatsoever, especially the sum of Sixteen Hundred Twenty-five ($1,625.00) Dollars, with Twelve (12) Per Cent penalty and One Hundred Sixty-five ($165.00) Dollars attorneys' fees.

III

The Court erred in holding that the fact that a stick was hurled by a passing car against the automobile — which appellee was riding striking said car and consinuing, striking the appellee in the eye, constituted appellant liable to appellee for any sum under the terms of said policy. There was no evidence in the record or stipulations that there was any external or visible evidence on the vehicle in which appellant was riding of the collision or accident as provided by the terms of said policy, Tr., page 15, this providing being "provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident."

IV

There is no evidence in the record to support the judgment of the Court in assessing appellant with a penalty of Twelve (12) Per Cent and attorneys' fees of One Hundred Sixty-five ($165.00) Dollars under Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, and the assessing of the said penalty and the said attorneys' fees is a violation of the Fourteenth Amendment of the United States Constitution as the taking of property without due process of law and Article 1, Section 10 of said [fols. 36–41] Constitution forbidding the passage of laws impairing the obligations of contract, inasmuch as this

judgment for penalty and attorneys' fees was assessed against appellant merely because a judgment was rendered against it without any proof that in refusing to pay said claim and in contesting said claim in Court, appellant acted in bad faith, the said Section 6155 of Crawford and Moses' Digest being unconstitutional under the said Fourteenth Amendment, and under said Article 1, Sec. 10 of said Constitution.

[fol. 42] SUPREME COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Aug. 16, 1933

We are in receipt of the following letter from the Clerk of this Court:

"August 10, 1933.

"Moreau P. Estes, Esq., Nashville, Tenn.

"DEAR SIR: Mr. Justice Butler has today returned your appeal papers in the case of Life and Casualty Insurance Company of Tennessee v. Albert Barefield. The Justice wishes me to advise you that he considers your petition for appeal and assignments of error defective in that they do not 'show that the State Supreme Court was called on to decide and ruled adversely to appellant on the constitutional questions on which it here seeks reversal, and that the statement under rule 12 is not necesarily to be deemed a part of the petition or assignment.'

"Your appeal papers are returned to you herewith.

"Yours truly, Charles Elmore Cropley, Clerk, by
(Signed) H. B. Willey, Assistant.

"HBW-W.
"Encl."

As a matter of fact, the constitutionality of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, copied in full on page 2 of the original Petition for Appeal, Assignment of Errors, and Prayer for Reversal, was ex-

pressly raised in the Motion for a New Trial before the Trial Judge in the following words:

[fol. 43] "Eighth. 'Because the Court erred in allowing a penalty in favor of the plaintiff and against the defendant for the reason that the defendant in resisting plaintiff's claim had reasonable grounds and cause therefor and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of being vexatious or for delay, but upon a well-founded belief that the plaintiff was not entitled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness of the defendant's refusal to pay, and without regard as to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law, and the fact that the plaintiff was not entitled to recover and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford and Moses' Digest of the Statutes of Arkansas, and which said Sections, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard as to whether the defendant's refusal to pay was based upon a well-founded belief, reasonably entertained under the facts, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and the equal protection of —

"Ninth. Because the Court erred in allowing plaintiff an attorney's fee for the reasons stated in item 8 hereof."

In the Supreme Court of Arkansas, the petitioner, Life & Casualty Insurance Company of Tennessee, made the following assignment:

[fol. 44] "There is no evidence in the record to support the judgment of the Court in assessing appellant with a penalty of Twelve (12) Per Cent and attorney's fees of One Hundred Sixty-five ($165.00) Dollars under Section 6155 of Crawford and Moses' Digest of the Statutes of Arkansas, and the assessing of the said penalty and the said attorneys' fees is a violation of the Fourteenth Amendment of the United States Constitution as the taking of property without due process of law and Article 1, Section 10 of said constitution forbidding the passage of laws impairing the obligations of contract, inasmuch as this judgment for penalty and attorneys' fees was assessed against appellant merely because a judgment was rendered against it without any proof that in refusing to pay said claim and in contesting said claim in Court, appellant acted in bad faith, the said Section 6155 of Crawford and Moses' Digest being unconstitutional under the said Fourteenth Amendment, and under said Article 1, Section 10, of said Constitution."

In its written opinion, the Supreme Court of Arkansas expressly passed upon this assignment in the following words:

"It is finally insisted that the trial court erred in assessing a penalty and attorney's fee in this case, for the reason that the insurer had defended in good faith under the belief that it was not liable. We have held, however, to the contrary. The plaintiff recovered the full amount sued for; indeed, there was a stipulation declaring the extent of the liability if the insurer was liable at all, and the fact that the assertion of non-liability was made in good faith is no valid defense to the assessment of a penalty and the allowance of an attorney's fee, as provided in Section 6155 Crawford & Moses' Digest. There was a review of what we regarded as the controlling authorities upon this subject in the recent case of Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, and we do not again review them."

The Court will note that the Supreme Court of Arkansas states in its above decision that it has lately ruled on this

question adversely to the contention of appellant in Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S. W. (2d) 638, as follows:

[fol. 45] "It is contended in both cases that the 12 per cent damages and attorney's fee were erroneously assessed, and that under section 6155, Crawford & Moses' Digest, no damages and attorney's fee should be assessed where defense is made in good faith and refusal to pay is based upon an honest and fairly debatable difference of opinion as to the law involved. It is conceded by appellant that this court has already taken a contrary view of the matter in Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581, and, it is insisted, as thus construed, the above statute runs counter to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. We do not agree with appellant in this regard, and we think the Supreme Court of the United States has decided the question adversely to appellant's contention. Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 S. Ct. 126, 133, 47 L. Ed. 204. Both of these cases construed the Texas statute, which is substantially the same as ours, requiring life and health insurance companies who shall default in payment of their policies to pay 12 per cent damages, together with reasonable attorney's fees, not to be in violation of the Fourteenth Amendment. In the latter case, Mr. Justice McKenna, speaking for the court, said: 'Notwithstanding our decision in Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 46 L. Ed. 922, 22 S. Ct. 662, the plaintiff in error urges the unconstitutionality of the Texas statute, authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning.' See Hartford Fire Ins. Co. v. Wilson & Toomer Fertilizer Co. (C. C. A.) 4 F. (2d) 835, certiorari denied 268 U. S. 704, 45 S. Ct. 639, 69 L. Ed. 1167.

"Moreover, this statute is a part of the insurance laws of this state, and has been since 1905. It is one of the conditions under which insurance companies are authorized to do business in this state, and, by transacting business here, such companies impliedly at least agree to be bound by the act. Fidelity Mutual Life Ins. Ass'n v. Mettler,

supra; American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U. S. 2, 39 S. Ct. 431, 63 L. Ed. 810."

[fol. 46] From the above it appears that the appellant has contended in its motion for a new trial and in its assignment of errors in the Supreme Court of Arkansas that the said Section 6155 of Crawford & Moses' Digest is unconstitutional when applied to a state of facts showing that the defendant insurance company acted in good faith in refusing to pay the claim and in defending the suit, and the above quotation from the Arkansas Supreme Court's opinion in this case shows without doubt that they passed upon the question and expressly held the statute constitutional when applied to a case in which there was no evidence of bad faith either in the refusal to pay the claim or in the defense of the suit.

It will be noted that the Arkansas Supreme Court in the above case states that the constitutionality of this statute as applied to cases showing no bad faith is settled in Fidelity Mutual Life v. Mettler, 185 U. S. 308.

The above case was decided on two questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of Security Mutual Life v. Pruitt, 202 U. S. 264, 50 L. Ed. 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in Terral v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 3[illegible], this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In Mortensen v. Security Insurance Company, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition

that an insurance company should not remove a case from a State to a Federal Court.

[fol. 47] These cases settle the proposition that an insurance company has the constitutional right under the Fourteenth Amendment to resort to a Federal Court, and the question here presented is whether or not an insurance company may be denied the right to resort to a State Court where its act in refusing to pay and in resorting to Court was not in bad faith.

In the case of McCray v. Life & Casualty Insurance Company of Tennessee, now pending on appeal and set for argument next November or December on the docket of the Supreme Court of the United States, the Arkansas Supreme Court recognizes the fact that the United States Circuit Court of Appeals for the Eighth Circuit in which Arkansas is located, has held this penalty statute of Arkansas unconstitutional when applied to cases lacking the element of bad faith, as shown by the following language:

"* * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statutes. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

As aforesaid, Arkansas is located in the Eighth Circuit and a direct conflict on the question of the constitutionality of this statute between these Courts ought to be settled by a decision of this Court. Otherwise, the law relating to the matter in that jurisdiction will be in a chaotic condition.

The question in this case, that is, the constitutionality of the statute creating a penalty against an insurance company merely because a judgment might be rendered against it, where there was no element of bad faith, was not presented in Fidelity Mutual v. Mettler, supra.

[fol. 48] We, therefore, submit that the case of Fidelity Mutual Life v. Mettler, supra, relied upon by appellee is no longer applicable so far as relates to the right of an in-

surance company to resort to any Court in order to defend a suit in good faith.

In the case of Mystic Circle v. Snyder, 227 U. S. 500, 57 L. Ed. 614, this exact point was before the Court. The exact point here presented was before the Court and this Court held the Tennessee Insurance Penalty Statute valid for the reason that it only imposed the penalty where the defense was made in bad faith.

We ask that this supplement be taken as a part of the original Petition for Appeal, Assignment of Errors, and Prayer for Reversal, hereto attached.

P. M. Estes, Myron T. Nailling, Attorneys for Appellant, Life & Casualty Insurance Company of Tennessee. Moreau P. Estes, of Counsel.

[fol. 49] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL

Petition for Appeal

Considering itself aggrieved by the decision of the Supreme Court of the State of Arkansas in the above styled cause, the appellant herein, Life & Casualty Insurance Company of Tennessee, hereby prays that an appeal may be allowed to the Supreme Court of the United States herein, and have an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Life & Casualty Insurance Company of Tennessee assigns the following errors in the record and proceedings in said case:

1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the

policy, and that Court erred in rendering any judgment against appellant.

3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas, in fact, it relates only to the degree of evidence essential to liability under the policy, [fol. 50] and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees of One Hundred Sixty Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy

and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates the said Fourteenth Amendment of the Constitu-
[fol. 51] tion of the United States.

5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees for One Hundred Sixty Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonable or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of Woodson v. Railroad, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Date of Decree

The date of the final judgment in the Supreme Court of Arkansas is June 26, 1933.

Application for Appeal

Application for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Arkansas on June 12, 1933, and was denied by him on July 19, 1933. This fact is shown by letter attached hereto from W. P. Sadler, Clerk of the Supreme Court of Arkansas.

[fol. 51a] SUPREME COURT, STATE OF ARKANSAS

Jesse C. Hart, Chief Justice. Frank G. Smith, T. H. Humphreys, William F. Kirby, Tom M. Mehaffy, E. L. McHaney, Turner Butler, Associate Justices.

Wm. P. Sadler, Clerk. Carl R. Stevenson, Deputy.
Ashton G. Sadler, Deputy.

Little Rock, July 19, 1933.

Mr. Moreau P. Estes, Asso. Gen. Counsel, Life & Casualty Ins. Co., Nashville, Tennessee.

DEAR SIR: Chief Justice C. E. Johnson has on this date, denied your prayer for an appeal to the United States Supreme Court in the case of Life & Casualty Ins. Co. v. Barefield, No. 3042.

Yours truly, W. P. Sadler, Clerk, by A. G. Sadler, Deputy.

[fol. 52] Prayer for Reversal

For which errors the appellant, Life & Casualty Insurance Company of Tennessee, prays that the said judgment (or decree) of the Supreme Court of the State of Arkansas, dated June 26, 1933, in the above entitled cause, be reversed and a judgment (or decree) rendered in favor of the said appellee, and for costs.

P. M. Estes, Myron T. Nailling, Solicitors for Appellant. Moreau P. Estes, of Counsel.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. —

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

ALBERT BAREFIELD, Appellee

ORDER ALLOWING APPEAL—Aug. 17, 1933

The appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment (or decree) made and entered in the above entitled cause by the Supreme Court of the State of Arkansas on the 26th day of June, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the Rules of the Supreme Court of the United States in such case made and provided;

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Arkansas shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty (40) days of this date.

And it is further ordered that security for judgment and costs on appeal be fixed in the sum of $2,500.

Dated this 17th day of August, 1933.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

[fol. 54] Citation, in usual form, showing service on John G. Rye et al., omitted in printing.

[fols. 55-60] Bond on appeal for $2,500, approved and filed, omitted in printing.

[fol. 61] Certificate of lodgment omitted in printing.

[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 63] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 6, 1933

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point 1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

Point 2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the policy, and that Court erred in rendering any judgment against appellant.

Point 3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas, in fact, it relates only to the degree of evidence essential to liability under the policy, and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

This holding of the Supreme Court of Arkansas violates appellant's rights under the due process clause of the Four-

[fol. 64] teenth Amendment of the Federal Constitution and its rights under Section 10 of Article 1 of the Federal Constitution prohibiting the impairing of the obligations of contract.

Point 4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five (195) Dollars, and attorney's fees of One Hundred Sixty Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates

the said Fourteenth Amendment of the Constitution of the United States.

Point 5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety Five [fol. 65] (195) Dollars, and attorney's fees for One Hundred Sixty Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonably or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

Point 6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of Woodson v. Railroad, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Section 10, Subsection 1 of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

Point 7. Said Section 6155 of Crawford & Moses' Digest of Arkansas is also unconstitutional under Section 10 of Article 1 of the Federal Constitution in that it makes the appellant liable for the said 12% damages of $195 and said attorney's fees of $162.50, when there is no provision in the policy contract sued on providing for such payments or justifying the allowance of such amounts.

[fols. 66 & 67] And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	
Complaint	2-3
Answer	6-7
Agreed Statement of Facts	13-14
Judgment of Lower Court	8
Motion for New Trial	9-11
Order Overruling Motion for New Trial and Granting Appeal	12
Judgment of Supreme Court of Arkansas	30
Opinion of Supreme Court of Arkansas	31-34
Assignments of Error	35-36
Supplemental Petition for Appeal, Assignment of Errors, and Prayer for Reversal	42-48
Petition for Appeal, Assignment of Errors, and Prayer for Reversal	49-52
Order of Arkansas Chief Justice Denying Appeal	51a
Order of Mr. Justice Butler Allowing Appeal	53
Bond on Appeal	55
Citation	54
Acknowledgment of Service (reverse side of page)	54
Statement of Jurisdiction	56-60
Certificate of Lodgment, Appeal	61

P. M. Estes, Counsel for Appellant, Life & Casualty Insurance Company of Tennessee.

We acknowledge service of the above "Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed", together with copy thereof for our use.

This 21 day of September, 1933.

John G. Rye, J. B. Ward.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 38,112. Arkansas Supreme Court. Term No. 509. Life & Casualty Insurance Company of Tennessee, appellant, vs. Albert Barefield. Filed October 6, 1933. File No. 509, O. T., 1933.